

NO. \_\_\_\_\_

STATE OF TEXAS,	§	THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
MCCAULEY DIRT COMPANY, INC.,	§	
Defendant.	§	_____ JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION,**  
**APPLICATION FOR TEMPORARY RESTRAINING ORDER,**  
**AND REQUEST FOR DISCLOSURE**

TO THE HONORABLE JUDGE OF SAID COURT:

The State of Texas, by and through its Attorney General, Greg Abbott, on behalf of the people of Texas and the Texas Commission on Environmental Quality (TCEQ), files this original petition, application for temporary restraining order, and request for disclosure, and for cause of action would show the following:

**1. DISCOVERY CONTROL PLAN**

1.1 Pursuant to TEX. R. CIV. P. 190, Plaintiff intends that discovery in this case be conducted under Level 2.

**2. PARTIES AND SERVICE**

2.1 Plaintiff, State of Texas, is authorized to bring this suit through its Attorney General at the request of the TCEQ pursuant to TEX. WATER CODE § 7.105(a).

2.2 Defendant McCauley Dirt Company, Inc. (McCauley) is a corporation organized under the laws of Texas. McCauley may be served with process by serving its registered agent, Debra M. McCauley, at 20 Springs Oaks Road, Burleson, Texas 76028-3617.

### **3. JURISDICTION AND VENUE**

3.1 This Court has jurisdiction over this suit pursuant to TEX. WATER CODE §§ 7.002 and 7.105(a).

3.2 Venue is proper in Travis County pursuant to TEX. WATER CODE § 7.105(c).

### **4. AUTHORITY**

4.1 This suit seeks to enjoin certain unlawful acts of the Defendant and seeks the assessment of civil penalties, attorney's fees, and court costs. TEX. WATER CODE §§ 7.032, 7.102, and 7.108.

4.2 When it appears that "a violation or threat of violation of a statute . . . has occurred or is about to occur" the State may bring suit in district court for "injunctive relief to restrain the violation or the threat of violation." TEX. WATER CODE § 7.032.

4.3 No filing fee or other security for costs is required of the State. TEX. CIV. PRAC. & REM. CODE § 6.001.

4.4 The State is entitled to a civil penalty of not less than \$50 nor greater than \$25,000 for each day of each violation by any person who causes, suffers, or allows a violation of a statute, rule, order, or permit within the TCEQ's jurisdiction. TEX. WATER CODE § 7.102.

4.5 TEX. WATER CODE § 26.121(a) contains the following prohibition:

Except as authorized by the commission, no person may:

(1) discharge . . . industrial waste into or adjacent to any water in the state;

(2) discharge other waste into or adjacent to any water in the state which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state, unless the discharge complies with a person's . . . water pollution and abatement plan approved by the commission; or

(3) commit any other act or engage in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state . . . .

4.6 Facilities with a Standard Industrial Classification (SIC) beginning with 10 through 14, must have a permit to discharge storm water into waters in the State. 30 TEX. ADMIN. CODE § 281.25(a)(4) (adopting by reference 40 C.F.R. § 122.26). In turn, 40 C.F.R. § 122.26(a)(1) requires a permit for a discharge of storm water associated with industrial activity.

4.7 Pursuant to its authority to issue a general permit authorizing the discharge of waste into or adjacent to waters in the state, the TCEQ issued Texas Pollutant Discharge Elimination System (TPDES) General Permit No. TXR050000 (General Permit) on August 20, 2001. This permit sets forth detailed requirements, prohibitions, and conditions for the discharge of storm water associated with industrial activity and authorizes such discharges only according to notice requirements, effluent limitations, monitoring requirements, and other conditions set forth in the General Permit.

4.8 The Sector J of the General Permit governs storm water discharges for SIC codes beginning with the number 14. Sector J specifically regulates mine dewatering, which is defined as “discharges from the mine pit of accumulated storm water and ground water seepage.” General Permit at 72.

4.9 To obtain authorization to discharge under the General Permit, a facility must submit a completed Notice of Intent (NOI) to the TCEQ requesting coverage. Before submitting an NOI, the facility must develop and implement a Storm Water Pollution Prevention Plan (SWP3). An SWP3 must contain the following minimum requirements:

A storm water pollution prevention plan (SWP3) must be developed and implemented before submitting an NOI for coverage under this general permit. The SWP3 must be maintained onsite or made readily available for review by authorized TCEQ personnel upon request. . . . The SWP3 shall be developed according to the requirements of this general permit to:

- (1) identify actual and potential sources of pollution that may reasonably be expected to affect the quality of storm water discharges from the facility;
- (2) establish practices and any necessary controls that will prevent or effectively reduce pollution in storm water discharges from the facility and that ensure compliance with the terms and conditions of this general permit;
- (3) describe how the selected practices and controls are appropriate for the facility and how each will effectively prevent or lessen pollution;
- (4) discuss how controls and practices relate to each other such that together they comprise an integrated, facility-wide approach for pollution prevention in storm water discharges. The discussion may include references to literature or site-specific performance information on the selected controls and practices to demonstrate the appropriateness of each.

General Permit, Part III, § A. The SWP3 must also include other detailed requirements set out in the General Permit. These include a description of potential pollutants and sources with an inventory of exposed materials, a site map with the location of each outfall and other features, and a description of pollution prevention measures and controls including a maintenance program, periodic monitoring, and record keeping.

## **5. BACKGROUND**

5.1 McCauley operates a mining facility (Facility) that primarily mines and processes sand. The Facility is located at 6700 Bennett Lawson Road in Mansfield, Tarrant County, Texas. McCauley's operations at the Facility are classified under SIC code 1442 and include excavating sand from a mining pit and processing the sand for sale. McCauley has operated this Facility for approximately two years.

5.2 The TCEQ conducted an investigation of the Facility on May 17, 2004. During this investigation, the investigator observed that the Facility operates two active mining pits referred to as the east and west pits. The investigator observed that both pits contained pumps with outlet hoses that ran to Willow Branch Creek. Willow Branch Creek flows from the west to the east just south of the site. The investigator observed the pump in the east pit actively dewatering the pit with its attached hose discharging water into a wooded area between the site and Willow Branch Creek. The investigator observed sediment from discharges settled in the area of the outfall.

5.3 During the investigation the investigator observed signs of past discharges of water from dewatering of the west pit. The investigator observed that the hose connected to the west pit's pump ran directly to Willow Branch Creek. The vegetation at the outlet of the hose from the west pump was lying flat and appeared dead. The investigator observed a large accumulation of sediment in Willow Branch Creek where the hose from the west pit entered the creek.

5.4 The investigator observed that immediately upstream from where the Facility discharged water from dewatering operations the bed of Willow Creek appeared in its natural condition with a darker color. Just below this point the bed of Willow Creek is covered with sediment from the dewatering operations.

5.5 During the investigation the investigator spoke with Tim Aldrich the production manager of McCauley who was present during the investigation. The investigator notified Mr. Aldrich that the Facility was in violation of the Water Code for failure to obtain a storm water discharge permit. On June 22, 2004, the investigator called Mr. Aldrich and also notified him that the Facility was in violation of the Water Code for failing to prevent unauthorized discharges into waters in the State.

5.6 The investigator noted that according to a prior TCEQ investigation report McCauley had previously operated a similar facility at another location in Mansfield, Texas. The prior investigation reported that, in 1999, the Facility owner was notified that its actions violated stormwater rules, which were then under the jurisdiction of the EPA.

5.7 McCauley does not have authorization to discharge water from mine dewatering or storm water from the Facility. McCauley has never submitted an NOI to the TCEQ to obtain coverage under the General Permit. McCauley does not have an SWP3.

## **6. CLAIM 1: CIVIL PENALTIES FOR UNAUTHORIZED DISCHARGES**

6.1 In violation of TEX. WATER CODE § 26.121(a), on at least May 17, 2004, McCauley caused the discharge of wastes into or adjacent to waters in the State without authorization from the TCEQ.

6.2 In addition, since beginning mining at the Facility, each and every day McCauley has committed acts that cause or will cause pollution of waters in the State in violation of TEX. WATER CODE § 26.121(a). In addition to discharging water from its mine pit, McCauley discharges storm water that runs off of other areas of the Facility.

6.3 The State seeks civil penalties from McCauley within the statutory range for each day of each violation of TEX. WATER CODE § 26.121(a) alleged herein.

## **7. CLAIM 2: CIVIL PENALTIES FOR FAILURE TO OBTAIN AUTHORIZATION UNDER THE GENERAL PERMIT**

7.1 McCauley has failed to submit an NOI to the TCEQ and has not developed and implemented an SWP3 as required by the General Permit. Since beginning mining at the Facility, McCauley has violated 30 TEX. ADMIN. CODE § 281.25(a)(4) each and every day.

7.2 The State seeks civil penalties from McCauley within the statutory range for each day of each violation of 30 TEX. ADMIN. CODE § 281.25(a)(4) alleged herein.

## **8. INJUNCTIVE RELIEF**

8.1 McCauley has caused the discharge of wastes into waters in the State without authorization from the TCEQ. McCauley has also failed to submit an NOI to the TCEQ and has not developed and implemented a SWP3 as required by the General Permit.

8.2 McCauley threatens to continue to violate TEX. WATER CODE § 26.121 and 30 TEX. ADMIN. CODE § 281.25(a)(4) unless restrained by the Court.

8.3 Pursuant to TEX. WATER CODE § 7.032, the State requests that this Court issue a temporary restraining order against Defendant McCauley Dirt Company, Inc. and its officers, agents, and employees, and those in actual concert or participation with them, to cease and

prevent all discharges of storm water associated with any industrial activity at the Facility into or adjacent to waters in the State. This includes, but is not limited to, discharges to Willow Branch Creek.

8.4 The State requests that, after notice and hearing, this Court issue a temporary injunction against Defendant McCauley Dirt Company, Inc., and its officers, agents, and employees, and those in actual concert or participation with them, to: (1) cease and prevent all discharges of storm water associated with any industrial activity at the Facility into or adjacent to waters in the State, including but not limited to, discharges to Willow Branch Creek, unless or until McCauley obtains written approval from the TCEQ, (2) develop and submit to the TCEQ for approval an SWP3 in full accord with the General Permit, (3) implement the SWP3 after it is reviewed and approved by the TCEQ, (4) after the SWP3 is implemented, submit an NOI to the TCEQ for authorization to discharge under the General Permit, and (5) remove all sand, sediment, and other debris down to the top soil in the area of past discharges between the east pit and Willow Branch Creek.

8.5 The State requests that, after trial on the merits, the Court issue such permanent injunctive relief as is warranted by the facts of the case established at that time.

## **9. ATTORNEY'S FEES AND COSTS**

9.1 The State requests recovery of its attorney's fees and court costs expended in the prosecution of this case from McCauley as authorized by TEX. WATER CODE § 7.108 and TEX. GOV'T. CODE § 402.006(c).

## **10. REQUEST FOR DISCLOSURE**

10.1 Pursuant to TEX. R. CIV. P. 194, McCauley is requested to disclose to the Plaintiff, within 50 days of service of this request, the information or material described in Rule 194.2 (a), (b), (c), (e), (f), and (i), and Rule 194.4.

### **PRAYER**

ACCORDINGLY, the State respectfully requests:

1. That a temporary restraining order be issued as requested in this petition;
2. That McCauley Dirt Company, Inc. be ordered to appear and answer herein;
3. That temporary and permanent injunctive relief be granted as requested in this petition;
4. That civil penalties be assessed as requested in this petition;
5. That the State recover its attorney's fees and court costs in this case; and
6. That the State be granted all other relief to which it is entitled.

Respectfully submitted,

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Attorney General of Texas

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First Assistant Attorney General

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ATTORNEYS FOR PLAINTIFF  
STATE OF TEXAS

**AFFIDAVIT**

**THE STATE OF TEXAS   §**  
**§**  
**§**  
**COUNTY OF TRAVIS   §**

Before me, the undersigned notary, on this day personally appeared DEANN RUSSEY, a person whose identity is known to me. After I administered an oath to her, upon her oath she said:

My name is DEANN RUSSEY, I am over the age of twenty-one years and of sound mind, capable of making this Affidavit, and personally acquainted with the facts herein:

I am employed by the Texas Commission on Environmental Quality as an Environmental Investigator in the Region 4 office of the Texas Commission on Environmental Quality.

I have read the foregoing Original Petition and Application for Temporary Restraining Order and Request for Disclosure and am familiar with the facts alleged. The facts alleged in paragraphs 5.1 through 5.7 of the Original Petition are within my personal knowledge and are true and correct.

\_\_\_\_\_  
DEANN RUSSEY

SUBSCRIBED AND SWORN TO before me on \_\_\_\_\_, 2004, to certify which witness may hand and official seal.

\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR  
THE STATE OF TEXAS